

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

10 MARK GUERRERO, ) Case No. ED CV 08-1414-PJW  
11 Plaintiff, )  
12 v. ) MEMORANDUM OPINION AND ORDER  
13 MICHAEL J. ASTRUE, )  
14 COMMISSIONER OF THE )  
15 SOCIAL SECURITY ADMINISTRATION, )  
16 Defendant. )  
17

18 I.

19 INTRODUCTION

20 Plaintiff Mark Guerrero brings this action seeking reversal of a  
21 decision by Defendant Social Security Administration ("the Agency"),  
22 denying his application for supplemental security income. He claims  
23 that the Administrative Law Judge ("ALJ") erred when he: 1) failed to  
24 properly consider the treating psychiatrist's opinion, 2) failed to  
25 properly consider a consulting psychiatrist's opinion, 3) rejected  
26 Plaintiff's testimony, 4) failed to include all of Plaintiff's  
27 impairments in the hypothetical question to the vocational expert, and  
28 5) concluded that Plaintiff could perform his former job as a parking  
lot attendant. (Complaint at 3.) For the reasons set forth below,

1 the Court concludes that the ALJ erred and remands the case to the  
2 Agency for further proceedings consistent with this opinion.

3 II.

4 SUMMARY OF FACTS AND PROCEEDINGS

5 Plaintiff was born on September 26, 1965, and was 41 years old at  
6 the time of the first administrative hearing. (Administrative Record  
7 ("AR") 245.) He completed the eleventh grade and, thereafter, a trade  
8 school for welders. (AR 246-47.) Plaintiff held numerous jobs  
9 between 1990 and 2000. (AR 114.) From 1998 to 2000, he worked as a  
10 driver at a parking lot owned by an automobile auction company. (AR  
11 121.) Plaintiff was fired from that job when he ran over another  
12 employee's foot and she sued the company. (AR 121, 178, 222, 249.)  
13 He did not work after 2000. (AR 114.)

14 Between June and September 2002, Plaintiff was treated for  
15 depression, fatigue, and an inability to concentrate at a San  
16 Bernardino County mental health clinic. (AR 163-75.) Plaintiff  
17 received counseling and medication during this period. (AR 163-75.)  
18 In September 2002, he stopped appearing for his appointments and was  
19 dropped from treatment. (AR 162.) There are no other mental health  
20 treatment records in the file.

21 In March 2005, Plaintiff filed an application for supplemental  
22 security income, alleging disability since October 1, 2000, due to  
23 attention deficit disorder and chronic fatigue syndrome. (AR 105,  
24 108.) The onset date was later amended to March 2005. (AR 247-48.)

25 Plaintiff's application was denied by the Agency initially and on  
26 reconsideration. Plaintiff then requested and was granted a hearing  
27 before an ALJ. On July 31, 2007, the ALJ held a hearing in which  
28 Plaintiff appeared with counsel and testified. (AR 238-55.) The

1 hearing was then continued so that Plaintiff could undergo a second  
2 psychiatric examination. (AR 254-55.) Following that examination,  
3 the ALJ held a second hearing, at which Plaintiff again appeared with  
4 counsel and testified. (AR 256-79.)

5 On January 25, 2008, the ALJ issued a decision denying  
6 Plaintiff's claim at step two of the Agency's five-step sequential  
7 evaluation process, concluding that Plaintiff's impairments (attention  
8 deficit hyperactive disorder and a depressive disorder) were not  
9 severe. (AR 11-16.) Plaintiff appealed to the Appeals Council, which  
10 denied his request for review. (AR 3-6.) He then commenced this  
11 action.

### 12 III.

#### 13 DISCUSSION

14 Plaintiff claims that the ALJ erred in failing to properly  
15 consider the opinions of his treating psychiatrist and a consulting  
16 psychiatrist. (Joint Stip. at 3-5, 7-8.) He also complains that the  
17 ALJ failed to set forth any reason for rejecting his testimony. (AR  
18 11-12.) For the reasons explained below, the Court agrees.<sup>1</sup>

#### 19 A. The Treating Physician's Opinion

20 Plaintiff contends that the ALJ failed to properly consider the  
21 treating psychiatrist's opinion. The Agency disagrees. It argues  
22 that the ALJ did all that he was required to do with regard to the  
23 treating psychiatrist's opinion. For the following reasons, the Court

---

24  
25 <sup>1</sup> Plaintiff also contends that the ALJ failed to include all of  
26 his limitations in the hypothetical question to the vocational expert  
27 and erred in concluding that Plaintiff was capable of performing his  
28 past job as a parking lot attendant. However, because the ALJ  
concluded at step two that Plaintiff did not have a severe impairment,  
he was not required to reach these other issues. For that reason, the  
Court will not address them at this time.

1 sides with Plaintiff and concludes that the ALJ erred in addressing  
2 the treating psychiatrist's opinion.

3 In general, the opinion of a treating doctor is given deference  
4 over the opinions of non-treating doctors in social security cases.  
5 *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007); see also *Aukland v.*  
6 *Massanari*, 257 F.3d 1033, 1037 (9th Cir. 2001). A treating doctor's  
7 opinion as to the nature and severity of an impairment must be given  
8 controlling weight if the opinion is well-supported and not  
9 inconsistent with other substantial evidence. See Social Security  
10 Ruling ("SSR") 96-2p; *Edlund v. Massanari*, 253 F.3d 1152, 1157 (9th  
11 Cir. 2001). An ALJ can only discount a treating doctor's opinion for  
12 specific and legitimate reasons, supported by substantial evidence in  
13 the record. *Orn*, 495 F.3d at 631 (citing *Lester v. Chater*, 81 F.3d  
14 821, 830 (9th Cir. 1996)). In determining what weight to afford a  
15 treating doctor's opinion, an ALJ must consider all of the evidence in  
16 the doctor's records, both the evidence that supports the ALJ's  
17 conclusion and the evidence that undermines it. See *Reddick v.*  
18 *Chater*, 157 F.3d 715, 722-23 (9th Cir. 1998) (noting it is  
19 impermissible for ALJ to develop evidentiary basis by "not fully  
20 accounting for the context of materials or all parts of the testimony  
21 and reports"). Further, even where a treating physician's opinion is  
22 not to be given controlling weight because it is not "well-supported"  
23 or because it is inconsistent with other evidence in the record, an  
24 ALJ must still consider various factors--including the length, nature,  
25 and extent of the treatment relationship; the amount of relevant  
26 evidence that supports the opinion; the consistency of the medical  
27 opinion with the record as a whole; and the specialty of the physician  
28

1 providing the opinion--in determining what weight to give it. *Orn*,  
2 495 F.3d at 631 (citing 20 C.F.R. § 404.1527 and SSR 96-2p).

3 The Court finds that the ALJ erred in two ways with regard to the  
4 treating psychiatrist's opinion. First, the ALJ focused on only the  
5 evidence that supported the ALJ's conclusion that Plaintiff was not  
6 disabled. Second, he failed to explain the basis for rejecting the  
7 opinion.

8 Plaintiff was treated at a county outpatient clinic in San  
9 Bernardino for three months in 2002. (AR 162-75.) His treating  
10 psychiatrist diagnosed him with, among other things, dysthymic  
11 disorder, and major depressive disorder. (AR 165.) Plaintiff  
12 received counseling and medication to treat his condition. (AR 163-  
13 69, 174.) In his decision, the ALJ summarized some of the findings  
14 from the treating psychiatrist's records, but focused only on the  
15 findings that supported his ultimate conclusion that Plaintiff was not  
16 disabled. He ignored other information that suggested that Plaintiff  
17 was impaired. For example, the ALJ noted that the psychiatrist had  
18 observed that Plaintiff was appropriately dressed, happy, and  
19 cooperative. (AR 13.) The ALJ also pointed out that the psychiatrist  
20 had found that Plaintiff's speech was relevant and his insight and  
21 function were fair. (AR 13.) The ALJ failed to mention, however,  
22 that the psychiatrist determined that Plaintiff's Global Assessment of  
23 Functioning ("GAF") was 55, (AR 13, 165), which suggested that  
24 Plaintiff would have had difficulty maintaining a job at that time.  
25 *See Diagnostic and Statistical Manual of Mental Disorders-IV-TR* at 34  
26 (describing a person with a GAF between 51 and 60 as someone with  
27 moderate symptoms or moderate difficulty in social, occupational, or  
28

1 school functioning).<sup>2</sup> And the ALJ left out the fact that the  
2 psychiatrist had diagnosed Plaintiff with major depressive disorder  
3 and dysthymia and had prescribed medication to treat it.<sup>3</sup> (AR 173.)  
4 The ALJ's failure to identify and address these findings, which  
5 undercut his conclusion that Plaintiff was not disabled, was error.  
6 On remand, he should address all of the treating psychiatrist's  
7 findings and his conclusion that Plaintiff was depressed.

8 The ALJ also erred when he failed to explain why he rejected the  
9 treating psychiatrist's opinion, an opinion that, all things being  
10 equal, should have been given deference in this case. See SSR 96-2p.  
11 The ALJ merely summarized the psychiatrist's findings and never  
12 discussed them again. (AR 13.) The Court, and Agency counsel who is  
13 left to defend the ALJ's decision, are left to wonder what the ALJ's  
14 basis was for rejecting the treating psychiatrist's opinion. Was it  
15 because the treatment was in 2002 and Plaintiff's onset date was 2005?  
16 That is one explanation posited by counsel in the Joint Stipulation.

---

18 <sup>2</sup> Though GAF scores are not controlling, and the Court would  
19 generally not find that an ALJ's failure to discuss a GAF score alone  
20 would warrant remand, the Court does find fault with the ALJ's failure  
21 to discuss the treating psychiatrist's score here. The ALJ set forth  
22 the other GAF scores in the record--higher scores of 61 and 75 from a  
23 non-treating psychiatrist--and explained how those scores supported  
24 his conclusion that Plaintiff was not disabled. (AR 14 (noting  
25 Plaintiff was assessed "a GAF of 75 indicating that if symptoms were  
26 present, they were transient and produced no more than a slight  
impairment in social, occupational, or school functioning.")) Where,  
as here, an ALJ elects to rely on GAF scores to reach his conclusion,  
he has to consider all the scores, not just the ones that support his  
conclusion. The ALJ's failure to discuss the lower score in light of  
his reliance on the higher scores was error.

27 <sup>3</sup> According to the medical expert, this entry evidences the  
28 treating doctor's opinion that Plaintiff's condition fell somewhere  
between major depressive disorder and dysthymia. (AR 273.)

(Joint Stip. at 5, n. 1.) Or maybe it was because the records did not establish that the condition lasted more than twelve months. Another explanation offered by counsel. (Joint Stip. at 6.) Or maybe it was because Plaintiff's psychiatric problems stemmed from his use of methamphetamine. A third plausible reason raised by Plaintiff's counsel. (Joint Stip. at 6.) The problem with all of counsel's reasons is that they are not relevant here. The Court can only affirm the ALJ's decision for the reasons he stated in his decision. See, e.g., *Pinto v. Massanari*, 249 F.3d 840, 847 (9th Cir. 2001) (holding ALJ's decision cannot be affirmed on a ground that the ALJ did not rely on in his decision). Because the ALJ failed to provide any reason for rejecting the treating psychiatrist's opinion, the decision is reversed.

B. The ALJ's Consideration of the State Agency Psychiatrist's Opinion

In his next claim for relief, Plaintiff argues that the ALJ erred when he failed to consider the opinion of the State Agency psychiatrist who reviewed Plaintiff's file in July 2005 and determined that Plaintiff was moderately impaired. (Joint Stip. at 7-8, 10-11.) The Agency counters that the ALJ impliedly addressed this opinion when he summarized the procedural history and noted that the Agency had found that Plaintiff was not disabled at the initial and reconsideration stages. For the following reasons, the Court finds that the ALJ erred here.

ALJ's are required to consider the opinions of non-examining doctors who are employed by the Agency to review the records and offer an opinion regarding a claimant's condition. 20 CFR § 416.927(f)(2)(i) ("[A]dministrative law judges must consider

1 findings of State agency medical and psychological consultants or  
2 other program physicians or psychologists as opinion evidence, except  
3 for the ultimate determination about whether you are disabled." ).

4 A reviewing psychiatrist determined that Plaintiff was moderately  
5 impaired in various functional areas critical to sustaining  
6 employment, including the ability to understand, remember, and carry  
7 out instructions and the ability to respond to changes in the work  
8 setting. (AR 198-200.) The ALJ did not discuss this opinion, which  
9 he was required to do, and, therefore, remand is ordered on this issue  
10 as well. The Agency's argument that the ALJ implicitly addressed this  
11 opinion when he noted that the state agency medical consultants had  
12 determined at the initial and reconsideration levels that Plaintiff  
13 could work (AR 14) is rejected. The exhibits the ALJ referred to in  
14 support of this finding were, essentially, form letters from the  
15 Agency signed by the Regional Commissioner. (AR 19-23, 25-30.) This  
16 is a far cry from the ALJ summarizing the consultative doctor's  
17 opinion that Plaintiff was impaired and explaining why that opinion  
18 was being rejected.

19 C. The ALJ's Consideration of Plaintiff's Testimony

20 Plaintiff contends that the ALJ erred when he failed to set forth  
21 any reasons for rejecting his testimony. The Agency argues that,  
22 based on the ALJ's discussion of the other evidence, it can be  
23 inferred that the ALJ considered and rejected Plaintiff's testimony  
24 for the right reasons. (Joint Stip. at 13-14.) The Court rejects  
25 this argument.

26 In the absence of an affirmative finding that a claimant is  
27 malingering, the ALJ can reject his testimony only by offering  
28 specific, clear and convincing reasons. See *Lingenfelter v. Astrue*,



1 504 F.3d 1028, 1036 (9th Cir. 2007). If the ALJ rejects the  
2 claimant's allegations as not credible, he must make specific findings  
3 which support this conclusion. *Bunnell v. Sullivan*, 947 F.2d 341, 345  
4 (9th Cir. 1991). In doing so, the ALJ must identify what testimony is  
5 not credible and what facts in the record lead to that conclusion.  
6 *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996); see also *Lester*,  
7 81 F.3d at 834 ("[g]eneral findings are insufficient; rather, the ALJ  
8 must identify what testimony is not credible and what evidence  
9 undermines the [plaintiff's] complaints").

10 The ALJ summarized parts of Plaintiff's testimony but never  
11 explained why he was rejecting it, which he implicitly did when he  
12 determined that Plaintiff was not disabled. On remand, the ALJ must  
13 set forth which parts of Plaintiff's testimony he is rejecting and  
14 why.<sup>4</sup>

15 D. The Remaining Issues Raised By Plaintiff Are Not Ripe For Review

16 Plaintiff contends that the ALJ erred in formulating the  
17 hypothetical question to the vocational expert and in ultimately  
18 determining that Plaintiff could perform his past work as a parking  
19 lot attendant. But, the ALJ's decision that Plaintiff was not  
20 disabled was based on his step-two finding that Plaintiff did not have  
21 a severe impairment. Other findings by the ALJ at steps four and five  
22 are not relevant to that finding and, therefore, the Court need not  
23 and does not address them at this time.

---

24  
25  
26 <sup>4</sup> The Court notes that the ALJ failed to address the brother's  
27 "testimony." (AR 124-32.) On remand, the ALJ should consider this  
28 testimony. *Stout v. Comm'r, Social Sec. Admin.*, 454 F.3d 1050, 1054  
(9th Cir. 2006) (recognizing it is error to fail to address lay  
testimony).

1 E. Remand Is Appropriate

2 Plaintiff asks that the Court not only remand the case but that  
3 it order the Agency to pay benefits on remand. The Court is not  
4 prepared to do that in this case. Though, as explained above, the  
5 Court has noted several mistakes in the ALJ's decision, the Court does  
6 not mean to suggest that Plaintiff is entitled to benefits. That is a  
7 decision left to the sound discretion of the ALJ in the first  
8 instance. Further, it is questionable whether this record supports  
9 such a finding. Plaintiff left his last job, a job he had held for 18  
10 months, because he was fired when he ran over another employee's foot.  
11 (AR 178.) He did not leave because he was unable to cope with work.  
12 In fact, there is practically no objective evidence in this record  
13 that would support his claim that he is incapable of working. The  
14 only treating records come from his brief treatment at a county mental  
15 health clinic three years before the alleged onset of disability.  
16 After attending a few therapy sessions, Plaintiff discontinued this  
17 treatment and did not seek other treatment. This suggests that his  
18 condition is not nearly as severe as he claims that it is. The  
19 consultative psychiatrist who examined him in 2005 and 2007, concluded  
20 in 2007 that Plaintiff was not impaired in the least (though she also  
21 concluded in 2005 that he was mildly to moderately impaired). (AR  
22 181, 226.) Plaintiff's testimony that he is disabled is not enough to  
23 establish that he is, assuming his testimony is found to be credible.  
24 Thus, there is little evidence to support Plaintiff's claim that he is  
25 disabled. For that reason, the Court will not order an award of  
26 benefits at this stage.

IV.

CONCLUSION

For the foregoing reasons, the Agency's decision is reversed and the case is REMANDED for further proceedings consistent with this Memorandum Opinion and Order.

IT IS SO ORDERED.

DATED: March 5, 2010.



PATRICK J. WALSH  
UNITED STATES MAGISTRATE JUDGE